October TERM 1970

NO. 5210

PETITION FOR A WRIT OF CERTIORARI NOT PRINTED.

PETITIONER'S SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI UNAVAILABLE.

Supreme Court, U.S.
FILED
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 5210

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 2172 Misc.

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JURISDICTION

The petition should be denied because:

1. The entry of the District Court from which this appeal was initiated by petitioners is not a final appealable order. That entry which was entered on September 30, 1968, merely constituted subsidiary findings of fact which were made by the district judge in compliance with the original judgment entered by the Court of Appeals on December 6, 1966. [369 F. 2d 55, 65, (6th Cir., 1966)]. The Notice of Appeal from the District Court to the Court of Appeals, states in part:

> "* * * Plaintiffs above named, hereby appeal from the memorandum and subsidiary findings of fact entered September 30, 1968 affirming the original judgment entered on the 9th day of August, 1965."

The District Court did enter a final appealable order on August 9, 1965. An appeal was taken from that order by present petitioners. The judgment of the District Court was affirmed by the Court of Appeals on December 6, 1966. A petition for a writ of certiorari was filed in this Court [No. 131] and denied on October 9, 1967 [389 U.S. 847], only one justice dissenting.

The Court of Appeals observed in the footnote to its opinion [419 F. 2d 1387, 1389] that an appeal does not lie from findings of fact or from a memorandum opinion, and cited:

> *Childs, et al.* v. *Ball Bros. Trucking Co.*, [5th Cir.] 193 F. 2d 134;
>
> *Rardin* v. *Messick*, [7th Cir.] 78 F. 2d 643;
>
> *Breeding Motor Freight* v. *R.F.C.*, [10th Cir.] 172 F. 2d 416.

2. There are no "special and important reasons" to grant the petition as required by Rule 19. This appeal could only involve a review of the subsidiary findings of fact made by the District Court in compliance with the order of the Court of Appeals when it originally considered this case. These findings are supported by an abundance of evidence. They could not have been disturbed by the Court of Appeals unless clearly erroneous. The Court of Appeals concluded that the findings of fact "are supported by substantial evidence and are not clearly erroneous."

3. The petitioners' first appeal did involve a constitutional question. That question reduced to its simplest terms is whether there is a constitutional right to attend a racially balanced school. That question was answered in the negative by the Court of Appeals when it affirmed the judgment of the District Court on December 6, 1966. [369 F. 2d 55] Nothing has transpired in this litigation to cause this Court to reach a different conclusion now than that which it reached on October 9, 1967 when the first petition for a writ of certiorari was denied.

QUESTIONS PRESENTED

1. IS THERE A CONSTITUTIONAL DUTY ON THE CINCINNATI PUBLIC SCHOOL OFFICIALS TO BALANCE THE RACIAL COMPOSITION OF THE CINCINNATI PUBLIC SCHOOLS BECAUSE THE NEGRO PUPIL POPULATION IS NOT UNIFORMLY DISTRIBUTED THROUGHOUT THE CINCINNATI PUBLIC SCHOOLS, WHEN THERE IS NO SHOWING OF DELIBERATE DISCRIMINATION OR RACIAL CLASSIFICATION?

2. SHOULD THE UNITED STATES SUPREME COURT CONSIDER QUESTION NO. 1 WHEN THE HOLDING OF THE SIXTH CIRCUIT IS IN CONFORMITY WITH THE OVERWHELMING WEIGHT OF AUTHORITY THROUGHOUT THE UNITED STATES, WHEN THE SAME QUESTION HAS BEEN PRESENTED FOR REVIEW IN A PETITION FOR WRIT OF CERTIORARI IN THE SAME CASE ON A PREVIOUS OCCASION AND TURNED DOWN; WHEN THE APPEAL OF THE PETITIONERS FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS WAS NOT BASED UPON AN APPEALABLE ORDER, AND WHEN THE PETITIONERS ARE PROCEEDING IN FORMA PAUPERIS, WHILE THE RECORD SHOWS THAT THIS HAS BEEN BETTER FINANCED THAN OTHER CASES ALLEGING SEGREGATION PROSECUTED BY THE NAACP.

STATEMENT OF THE CASE

The record in this case is voluminous. It includes a lengthy printed stipulation, 286 joint documentary exhibits, and 777 pages of transcript. It nonetheless can be summarized in two paragraphs:

(1) The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended almost entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply the result of the racial composition of the neighborhoods which they serve.

(2) A professor of education from Antioch College and a professor of sociology from Washington University, St. Louis, both expressed the opinion that "a racially unbalanced school seriously affects a child's ability to learn."

The record is clear that there has been an irregular shift of populations in Cincinnati in recent years. This has caused many predominantly white and racially balanced schools to become all Negro in a period of two or three years, even though the school attendance zone boundary lines remain substantially unchanged.

The District Court made a finding that there was insufficient evidence to show that racial imbalance in some of the schools was caused by unlawful action of the respondents. The Circuit Court of Appeals remanded the case to the District Court for subsidiary findings to substantiate this general conclusion. The case was then appealed to the Supreme Court of the United States where certiorari was denied, 389 U.S. 847. In the second hearing in the District Court the petitioners elected not to offer any additional evidence. The District Court reviewed the record as it had existed before the first appeal and made additional subsidiary findings supporting its general conclusion that there was no evidence to justify a finding of discriminatory practices on the part of the respondents. The District Court also found that the expert testimony was of insufficient probative value to require rebuttal, noting among other things that every one of

the predominantly Negro schools was achieving better than one all white school.

The record is clear that in the 83 years since segration was abolished in Ohio in 1887 [84 *Ohio Laws* 34; *Board of Education* v. *State,* 45 Ohio St. 555, 16 N.E. 373 (1888)] Negro students have attended the neighborhood schools in Cincinnati on the same basis as white students. The Cincinnati Public Schools have always operated under what is commonly referred to as the "neighborhood plan" which is provided for by the Ohio Revised Code, Sec. 3313.48, which provides:

> "The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (emphasis supplied)

The Cincinnati Board of Education considered the question of racial imbalance and adopted a policy with regard to racial imbalance as enumerated in Stipulation 11:

> "*Defendants' Policy Statement*: On the 9th day of March, 1964 the defendants agreed on a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:
>
> "(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines as — safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de-facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such.

"The plaintiffs deny that point 1 is actually the policy of the defendants."

ARGUMENT

I.

IS THERE A CONSTITUTIONAL DUTY ON THE CINCINNATI PUBLIC SCHOOL OFFICIALS TO BALANCE THE RACIAL COMPOSITION OF THE CINCINNATI PUBLIC SCHOOLS BECAUSE THE NEGRO PUPIL POPULATION IS NOT UNIFORMLY DISTRIBUTED THROUGHOUT THE CINCINNATI PUBLIC SCHOOLS, WHEN THERE IS NO SHOWING OF DELIBERATE DISCRIMINATION OR RACIAL CLASSIFICATION?

The law is well settled in the United States that there is no constitutional right on the part of students to go to a racially balanced public school if there is racial imbalance caused by residential housing patterns when a public school system administers fairly and impartially a neighborhood school policy.

The petitioners make a number of statements which are designed to mislead the court with respect to the facts in this case in an effort to induce the Supreme Court to take jurisdiction for the purpose of reversing the fact finding under Rule 52 (a) of the Federal Rules of Civil Procedure that there is no gerrymandering or other evidence of de jure segregation. A number of these misleading statements are dealt with in the Appendix to this brief.

The clearest indication that this is a case where racial imbalance has been brought about by factors over which the Cincinnati Board of Education had no control, is found in Joint Exhibit No. 9, reproduced in the Defendants-Appellees' Appendix at page 171 (b) and 172 (b). The impact of the information in the table contained in Joint Exhibit No. 9 is demonstrated visually in bar charts labelled "Defendants' Exhibits 1-15" inclusive, contained in the Defendants-Appellees' Appendix at page 233 (b). These bar charts and Joint Exhibit No. 9 illustrate a number of schools where the attendance zone boundary lines remain relatively unchanged, yet in a very short period of time the schools went from the position of relative racial balance to a position of racial imbalance simply as the result of the free mobility of people. At the time of the lawsuit the pupil population of the Cincinnati Public Schools was approximately 30% Negro. At the time covered by the bar charts, the percentage ranged from approximately 15% to approximately 30% Negro, depending upon the year. Suddenly each school became Negro. At the present time, the elementary schools in Cincinnati are 47% Negro and the secondary schools are 43% Negro. It cannot be more clear that racially imbalanced schools have developed in Cincinnati as the result of the free mobility of families.

None of the cases that the Petitioners cite as being in conflict with the decisions of the Sixth Circuit are in conflict with the *Deal* opinion and none involve a bona fide administration of a neighborhood school policy on a non-discriminatory basis as was the situation presented to the District Court in *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (1969).

Four of the cases cited involve situations where the local law had, prior to *Brown* v. *Board of Education,* required segregation in the public schools [*U. S.* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); *Brewer* v. *School Board of Norfolk, Va.,* 397 F.2d 37 (Fourth Circuit 1968); *U. S.* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (Fifth Circuit 1969); *Goss* v. *Board of Education of Knoxville, Tenn.,* 373 U.S. 683 (1963)], one involved a situation of existing Federally imposed school segregation [*Bolling* v. *Sharpe,* 347 U.S. 497 (1954)], one involved school segregation caused by state imposed housing segregation [*Holland* v. *Board of Public Instruction,* 258 F.2d 730 (Fifth Circuit 1958)], and one involved the practice of gerrymandered municipal voting boundaries [*Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960)].[1]

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[1] Following is a summary of the factual situation and the holding in each of the seven cases cited as being in conflict with Deal. They are grouped and listed in the order they appear in the second paragraph above.

a.) *U. S.* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). Not only had the Montgomery County Board of Education maintained a dual system of public schools prior to the Brown decision but

> "Neither Montgomery County nor any other area in Alabama voluntarily took any effective steps to integrate the public schools for about ten years after our *Brown* I opinion." 395 U.S. at 228.

The narrow issue in this case dealt with faculty and staff desegregation (395 U.S. at 231) and the court affirmed a district court order which

Furthermore, many of the cases cited as being in conflict with *Deal* may be more appropriately cited in support of it. For example, the Fourth Circuit said in *Brewer*:

> "In *Gilliam* v. *School Board of City of Hopewell*, 345 F. 2d 325 * * * we approved geographical zoning for the assignment of pupils."

And also:

> "Assignment of pupils to neighborhood schools is a sound concept."

The Fifth Circuit Court said in *Holland*:

> "The infant plaintiff was entitled to be treated simply as another school child without regard to his

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called for a goal of a ratio in each school of white to Negro faculty members substantially the same as it is throughout the system. (395 U.S. at 232).

b.) *Brewer* v. *School Board of Norfolk, Va.*, 397 F. 2d 37 (4th Circuit 1968). The Norfolk, Virginia Public School System was under an affirmative duty to eliminate segregated schools because it had a past policy of a racially segregated dual school system, 397 F. 2d at 38, footnote 2. This case dealt with objections to proposed plans to eliminate segregated schools, especially with certain aspects in the wake of a "freedom of choice" plan. The court stated:

> "In *Gilliam* v. *School Board of City of Hopewell*, 345 F. 2d 325 (4th Circuit) . . . we approved geographical zoning for the assignment of pupils. We also said that such a system may not serve as a guise for gerrymandering zones to foster racial segregation." 397 F. 2d at 41.

And also:

> "Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color." 397 F. 2d at 42.

The case was remanded to the district court for a finding of whether the racial pattern of the districts was a result of racial discrimination in regards to housing.

c.) *U. S.* v. *Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Circuit 1969). The plaintiffs challenged the effective-

> race or color, and the fact that he was a Negro did not vest him with a right to attend a school located in a district in which he did not reside when the geographical rule was being applied to all children alike."

The Petitioners' suggestion that this case raises unsettled questions and that there are conflicts among different circuits is certainly not correct. The Sixth Circuit was one of the first circuits to hold that segregation brought about by gerrymandering is unlawful. *Clemons* v. *Board of Education of Hillsboro,* 228 F.2d 853 (Sixth Cir.), cert. den. 350 U.S. 1006 (1956). In the case presently under consideration, the Sixth Circuit has merely held that

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ness of the state's "freedom of choice" plan as a device to alleviate the state imposed dual system of racially segregated schools. In holding that this plan did not meet the "affirmative duty" imposed upon the school board by the *Brown* decision, the court stated that:

> "Freedom of choice cannot be used since it has not done the job that is constitutionally required, *i.e.*: the job of converting a dual system into a unitary system in which the separate tracts for Negro and white students are no longer identifiable."

In the system, one school district (the Bankston School) was not subject to the "freedom of choice" plan because it was geographically separated from the other district by rivers. The school in this district was all white because the population of the district was all white. In holding that this part of the school district plan must fall with the rest of the plan, the court noted:

> "We do not rule out geographic zones for Greenwood, nor do we say that the Bankston zone will not fit into a valid over-all plan. We do say that a new plan must be devised to eliminate the remaining, glaring vestage of a dual system." 406 F. 2d at 1093.

d.) *Goss* v. *Board of Education of Knoxville, Tenn.,* 373 U.S. 683 (1963):

This holding is limited to certain transfer provisions of Knoxville's proposed desegregation plans, which provided for the transfer of a student, on request, from a desegregated school to a segregated school. The court held this provision unconstitutional as being based upon racial factors which could only lead to segregation and noted that

where a public school system is operated on a neighborhood basis without any arbitrary classification of pupils on the basis of race or any other similar discriminatory practice, the mere fact that residential housing patterns bring about some schools that are predominantly black, other schools that are predominantly white, and other schools that have every possible combination of white and black pupils that one can imagine, does not give the constitutional right to the plaintiffs to attend a racially balanced school. There is nothing novel or unusual about this proposition of law.

Indeed, the first person to explain this in a judicial forum was Mr. Justice Thurgood Marshall when he was counsel for the children in the argument of *Brown* v.

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the plan did not allow for transfer from a segregated school to a desegregated school.

The court further noted, in limitation of its holding:

> ". . . if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free from any imposed racial considerations, to remain in the school of their zone or to transfer to another." 373 U.S. at 687.

The opinion below is clear on the point that at the time suit was initiated, Knoxville operated a dual system of racially segregated public schools in accordance with the Constitution of Tennessee. 301 F. 2d 164, 166 (1966).

e.) *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). This is the companion case to *Brown* v. *Board of Education*, 347 U.S. 483 (1954) arising from the District of Columbia. The holding was similar in effect to Brown, but was based upon the Fifth Amendment, just as the Brown decision rested on the Fourteenth. The court stated:

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500.

Prior to this decision, the District of Columbia maintained a dual system of racially segregated public schools. See statement to this

Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, 38 A.L.R. 2d 1180. According to a recent article that reported on the 1969-70 Oliver Wendell Holmes lectures at the Harvard Law School which were delivered by Alexander M. Bickel, Chancellor Kent Professor of Law and Legal History at the Yale Law School, when Mr. Justice Frankfurter asked Mr. Marshall whether or not a decision in favor of his clients would "entitle every mother to have her child go to a non-segregated school * * *?" Mr. Marshall replied, "No, sir." Mr. Justice

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effect in *Hobson* v. *Hansen*, 269 F. Supp. 401 (DDC 1967).

f.) *Holland* v. *Board of Public Instruction*, 258 F. 2d 730 (5th Circuit 1958):

The public schools of Palm Beach, Florida were being administered under a neighborhood school plan which had previously been held constitutional on its face, but the city imposed "compulsary residential segregation of the races by City Ordinance" (not in this case directly challenged) which boundaries apparently coincided with the school district boundaries. In holding that the city must act to eliminate segregated schools, the court noted that:

> "The infant plaintiff was entitled to be treated simply as another school child without regard to his race or color, and the fact that he was a Negro did not vest him with a right to attend a school located in a district in which he did not reside when a geographical rule was being applied to all children alike." 258 F. 2d at 732.

Also, the court reiterated:

> . . ."the principle announced in several of our decisions that the Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation." 358 F. 2d at 732.

g.) *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960):

This is not a case concerning public schools. The court held that the State of Alabama could not re-define the municipal boundaries of the city of Tuskegee solely on racial considerations. The plaintiffs' allegations were that the new city limits removed from the city all but four or five of its 400 Negro voters while not removing a single white voter or resident. The court held that if plaintiffs could show these facts at trial they would be entitled to relief.

Frankfurter then asked, "What will it do?" To this, Mr. Marshall replied, "The School Board, I assume, would find some other method of distributing the children, a recognizable method, by drawing district lines." Mr. Marshall added, "If the lines are drawn on a natrual basis, without regard to race or color, then I think that nobody would have any complaint."[2]

This is exactly the way the overwhelming majority of cases has interpreted the *Brown* case. *Offerman* v. *Nitkowski,* 248 F. Supp. 129 (W.D. N.Y., 1965) aff'd. 378 F.2d 22 (Second Circuit 1967); *Sealy* v. *Dept. of Public Instruction,* 252 F. 2d 898 (Third Cir. 1957), cert. den. 356 U.S. 575; *Gilliam* v. *School Board,* 345 F. 2d 325 (Fourth Cir. 1965), vacated on other grounds, 382 U.S. 103; *Griggs* v. *Cook,* 272 F. Supp. 163, aff'd. 384 F. 2d 705, (Fifth Cir.); *Deal* v. *Board of Education,* 369 F. 2d 55 (Sixth Cir. 1965); *Bell* v. *School City,* 213 F. Supp. 819 (N.D. Ind.) aff'd. 324 F. 2d 209 (Seventh Cir.) cert. den. 377 U.S. 924 (1963); *Downs* v. *Board of Education,* 336 F. 2d 988 (Tenth Cir. 1964) cert. den. 380 U.S. 914 (1964).

The court decisions appear to recognize that although interracial experiences may be a desirable by-product of public education, there is no constitutional mandate that every pupil attend a racially balanced school when the school system has not engaged in any unlawful segregation.

The leading case (prior to *Deal* v. *Board of Education*) is probably *Bell* v. *School City of Gary, Indiana,* 213 F. Supp. 819, aff'd. 324 F. 2d 209 (Seventh Cir.) cert. den. 377 U.S. 924 (1963), in which the Seventh Circuit explicitly affirmed the District Court's statement that there is:

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[2] Leon Friedman (Ed): *Argument,* New York: Chelsea House (1969) pp. 47-48; the report of Professor Bickel's lectures, including this colloquoy is contained in Vol. 21 *Harvard Law School Bulletin,* No. 2 (Dec. 1969), pp. 16, 36.

> "Nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system, developed on a neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites." 324 F. 2d at 213.

The operative facts which give rise to litigation in cases where there is racial imbalance may vary, but almost every court that has considered the question of whether or not there is an affirmative duty to bring about racial balance has said that there is no such duty. The case of *Sealy* v. *Dept. of Public Instruction*, 159 F. Supp. 561, aff'd. 252 F. 2d 898 (Fifth Cir. 1957) cert. den. 356 U.S. 975, arose when Negro plaintiffs complained that they were being discriminated against because a new junior high school was being located in a predominantly white neighborhood. The court found that the school location had been determined by non-racial criteria and dismissed the complaint as being "largely one of convenience."

Very recently the United States Court of Appeals for the Fourth Circuit ruled that even in a system guilty of de jure segregation, not every school within the district must be balanced in order to comply with the Supreme Court's demand for unitary school system. *Swan, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, — F.2d —, (May 26, 1970) (see article May 27, 1970, *New York Times*, p. 1). The opinion recognized that the bussing was a "permissible tool" for the achievement of racial integration in a formerly segregated school system, but that it was not a "panacea" for solving all school problems. "Not every school in a unitary school system need be integrated."

The most recent surveys of all cases in this field conclude that the weight of authority recognizes that there is no constitutional duty to balance the races in every public school or to say it another way, that every student does not have a constitutional right to attend a racially balanced school.

Recently it was observed in 83 Harv. L. Rev. 1439, note 34, (1970):

> "Most courts have held that there is no constitutional duty to alleviate de facto segregation in education. (cases cited) * * *. The courts distinguished de facto segregation from situations involving past de jure segregation, in which an affirmative duty to integrate exists."

Similarly, it was reported recently in 53 Iowa L. Rev. 1184, (1968):

> "However, equal protection has generally been invoked to prohibit only de jure segregation, that is, segregation resulting from governmental policy. De facto segregation, which is produced by factors not the result of governmental policy, has generally been considered beyond the scope of the guarantee of equal protection."

In 41 N. Dak. L. Rev. 346, 352 (1965), the editors report:

> "The box score of followers of each holding is weighted heavily in favor of the constitutionality of the neighborhood school plan."

In 35 G. Wash. L. Rev. 698, 701 (1967), it is reported:

> "A few courts have held or stated in *dictum* that, under certain circumstances, there is a constitutional duty to alleviate racial imbalance even when it is not caused by racially motivated state action. Most

courts have held or stated in *dictum* that there is no such duty."

The United States Court of Appeals for the Second Circuit recently surveyed the cases and concluded:

> "Courts generally agree that communities have no constitutional duty to undo bona fide de facto segregation." *Offerman* v. *Nitkowski,* 378 F. 2d 22, 24 (Second Cir. 1967).

The same conclusion was arrived at in 16 W. Res. L. Rev. 544 (1965):

> "Despite the nine-way stretch which has been applied to the constitution in certain areas, it is difficult to see how the language, history and repeated constructions of the 14th Amendment could be so distorted as to read into it a veto of de facto segregation."

The District Court in *Broussard* v. *Houston Independent School District,* 262 F. Supp. 266 (1966) observed:

> "To these general principles is added the proposition that the Constitution as expounded by *Brown* v. *Board of Education* does not compel racial intermingling in public schools in any particular degree or form but simply forbids enforced segregation on a racially discriminatory basis."

The personal and educational disruption caused by massive bussing, which would be required for racial balance in most large cities, to say nothing of a financial waste, is something that cannot be ignored, as was recently observed:

> "To ignore the financial impact that the new plan might have on the system would possibly result in a community being blessed with a school system that is completely balanced as to race, but so far in debt

> that the standard of education for all schools is lower than that of the most inferior under the old imbalanced system." 41 N. Dak. L. Rev. 346, 350 (1965).

The Sixth Circuit obviously considered the article written by Professor Paul A. Freund to have great bearing upon the problem. The Sixth Circuit not only cited Professor Freund's article but its analysis is very similar to Professor Freund's analysis.

Professor Freund made reference to the position that the Supreme Court took in regard to public accommodations as follows:

> "And so I come back to my central point, that in the field of public accommodations, the most thorny current issue, we are dealing not with intimate family relations or the good samaritan stranger, but with everyday business relationships that depend on the existence and the enjoyment of a great national market which is of federal and not merely local concern. There is in this connection, I believe, a real issue as to the choice of legal instrumentalities in addition to the point already made about the choice of drafting techniques; that is to say, there is a choice between a direct constitutional limit on private action and a limit imposed by statutory law. Those who argue that the fourteenth amendment, in and of itself, applies or should apply to places of public accommodation do so partly because they see in the fourteenth amendment the most appropriate source of moral strength. But I believe they overlook some institutional considerations of importance. If we were to use the fourteenth amendment directly without the intervention of an act of Congress, as some members of the Court wished to do last June, there would have been all kinds of unresolved questions of the range of application of the fourteenth amendment; not merely in racial discrimination, for the fourteenth amendment is far broader than that, but in other forms of

> equal protection, nepotism in business, for example, in the concept of due process of law applied, for instance, to the conduct of stockholder meetings or labor union meetings. All of these would potentially be federal constitutional questions to be resolved by authoritative decisions overrulable by constitutional amendment, but surely lacking in that sense of tentativeness, of experimentation, of progressivism, of flexibility, that are the hallmarks of statutory or common law development as distinguished from constitutional adjudication. And so I for one welcome the fact that the Court did not see fit last June to decide the cases on sit-ins in places of public accommodation on grounds of the fourteenth amendment per se. The choice of institutional means pointed in the direction of the more flexible and *ad hoc* approach." Paul A. Freund: "Civil Rights and the Limits of Law," 14 Buffalo L. Rev., 199, 203-204 (1964).

In his analysis he clearly points to the danger of trying to do the task that properly belongs to administrative and legislative discretion by means of constitutional litigation. Education is a complicated process. The most informed authorities are not certain as to what works and what does not work in the field of education or in the field of intercultural and interracial relations. For this Court to carry the constitutional doctrine beyond the position where segregation is prohibited into the adoption of a doctrine that there is a constitutional right on the part of every student to attend a racially balanced school would be to make an educational decision, not required by the constitution, based upon inadequate information which might or might not be educationally beneficial. This kind of decision should be left to the agencies that are actually running the school systems, so that they can follow a trial and error approach to see what will improve relations between the races and what will not.

Professor Freund applies this analysis to the school system in the following paragraph:

> "But suppose these conditions are not present in de facto segregation. Still a legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run de facto desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the cases of requiring integration constitutionally but only of permitting the race factor to be taken into account by a school board disposed to do so, without violating the abstract principle of color blindness. This is a question of educational and social policy, a choice of means to a legitimate end, the encouragement of desegregation, as segregation itself would be an illegitimate end. There the matter rests and, in my judgment, is likely to rest so far as constitutional law is concerned." Paul A. Freund: "Civil Rights and the Limits of Law," 14 Buffalo L. Rev., 199, 205 (1964).

If there is one thing that should be clear it is that the overwhelming weight of authority in the United States is that there is no constitutional duty for a public school system that conscientiously and impartially administers a neighborhood school policy to bring about racial balance in a public school. Correspondingly, every student does not have the constitutional right to attend a racially balanced school. As a practical matter, if this right existed it would create administrative and educational chaos in most of the larger cities of the United States.

II.

SHOULD THE UNITED STATES SUPREME COURT CONSIDER QUESTION NO. 1 WHEN THE HOLDING OF THE SIXTH CIRCUIT IS IN CONFORMITY WITH THE OVERWHELMING WEIGHT OF AUTHORITY THROUGHOUT THE UNITED STATES, WHEN THE SAME QUESTION HAS BEEN PRESENTED FOR REVIEW IN A PETITION FOR WRIT OF CERTIORARI IN THE SAME CASE ON A PREVIOUS OCCASION AND TURNED DOWN; WHEN THE APPEAL OF THE PETITIONERS FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS WAS NOT BASED UPON AN APPEALABLE ORDER, AND WHEN THE PETITIONERS ARE PROCEEDING IN FORMA PAUPERIS, WHILE THE RECORD SHOWS THAT THIS HAS BEEN BETTER FINANCED THAN OTHER CASES ALLEGING SEGREGATION PROSECUTED BY THE NAACP.

There are five good reasons why the United States Supreme Court should not consider the Petitioners' request. These are:

1. The holding of the Circuit Court of Appeals is in conformity with the overwhelming weight of authority throughout the United States in cases of this sort.

2. The same question in this same case previously has been considered for review by this court and the petition for writ of certiorari denied. *Deal* v. *Cincinnati Board of Education,* 389 U.S. 847 (1966).

3. The appeal which was taken by the petitioners from the District Court to the United States Court

of Appeals for the Sixth Circuit was not based upon an appealable order.

4. The petitioners are proceeding *in forma pauperis;* whereas, the record clearly shows that this case has been better prepared and better financed than other cases prosecuted by the NAACP.

5. This case was decided in the trial court after the presentation of the plaintiffs' evidence and consequently if the petitioners were successful in getting the four previous court opinions reversed, the litigation would still go back to the trial court for the defendants to present their evidence, thereby keeping this case open indefinitely. It has been in existence since 1963 and this lawsuit has constituted an open sore in the Cincinnati community promoting and cultivating tension among black and white families.

(1) This case has previously been the subject of four lower court opinions. The trial court issued its opinion in 1965, which is reported at 244 F. Supp. 572. The United States Court of Appeals for the Sixth Circuit issued its first opinion in 1966 which was reported in 369 F. 2d 55. After the petition for writ of certiorari was denied, the District Court reviewed the same evidence that had been before it the first time and made subsidiary findings with regard to its general conclusion that there is the absence of evidence to show that there was intentional segregation in Cincinnati. This opinion is reported as an appendix to the opinion issued after the second appeal, 419 F. 2d 1387 (1969). Each of these cases reviewed the authorities as they then existed throughout the United States. It should be apparent from the discussion of the law under the first question presented, that in each case the lower court was correct in its conclusion that the overwhelming weight of authority is that there is no

constitutional duty to balance the races in a public school system that follows the neighborhood school policy and has been integrated since 1887.

(2) The same question that now is presented here has previously been reviewed by the United States Supreme Court. The record is identical to that previously considered except for the fact that there have been two additional lower court opinions written since then. No additional evidence has been received from the petitioners or from the respondents. The trial court went back through the original record and made the subsidiary findings that it was directed to make by the Court of Appeals. The Court of Appeals has reviewed the entire case, including the subsidiary findings, and found that the trial court was correct in its determination that there was no intentional segregation in the Cincinnati Public Schools and that there is no constitutional right on the part of the petitioners to attend a racially balanced school.

(3) The Petitioners filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on the 30th day of October, 1968, which stated in part:

> "* * * Plaintiffs above named, hereby appeal from the memorandum and subsidiary findings of fact entered September 30, 1968, affirming the original judgment rendered on the 9th day of August 1965."

The Petitioners' appeal from the District Court to the Court of Appeals was not taken from a final appealable order. The District Court did not file an appealable order on September 30, 1968; the only order from which an appeal can be taken in this case is the order that was entered on the 9th day of August 1965. At the time the notice of appeal upon which this petition is based was filed the statutory time for a notice of appeal had

elapsed since 1965. In addition, the previous order had been fully reviewed by the Court of Appeals for the Sixth Circuit and the United States Supreme Court had denied the petition for writ of certiorari.

An appeal does not lie from findings of fact or from a memorandum opinion. *Childs, et al* v. *Ball Bros. Trucking Co.,* 193 F.2d 134; *Rardin* v. *Messick,* 78 F.2d 643; *Breeding Motor Freight* v. *R.F.C.,* 172 F.2d 416.

(4) The parties are proceeding *in forma pauperis.* One Nathaniel R. Jones, a lawyer who previously had been a stranger to this case, made application for extension of time within which to file a Petition for Writ of Certiorari. This application was granted. In the application Mr. Jones made the following representation:

> "VI. Counsel for petitioners consisted of lawyers of the NAACP Legal Staff who resigned in November, 1968, leaving the petitioners without counsel to carry forward their litigation.
>
> VII. In October, 1969, Nathaniel R. Jones was appointed General Counsel of the NAACP, thereby becoming supervising counsel of this and other cases. The time required for him to familiarize himself with this case has contributed to the delay in the preparation of the petition for a writ of certiorari within the normal time allowed by Rule 22 (1) of the Rules of the Supreme Court of the United States."

The record shows that this case is better financed than other cases prepared by the NAACP:

> "The Court: Mr. Carter, on that subject, on April 9 of this year, Mr. Steel indicated that this case was better prepared, and would be more fully presented because the National Association for the Advancement of Colored People had more money available for the preparation of this case than had been true in the preparation of other cases." (App. 178a)

The present representation that this case only can be prosecuted *in forma pauperis* is completely inconsistent with the record in this case, and inconsistent with the representations made on behalf of the petitioners in order to get extensions of time in this Court.[3]

(5) This case has been proceeding since 1963. The existence of this case has generally increased tensions and disagreements between white and black citizens in the Greater Cincinnati area. Shortly before the initial trial of this case, the plaintiffs' local counsel and others helped to organize a system wide boycott to induce Negro students to stay away from school. The boycott was relatively unsuccessful, but since that time there has been an extraordinary number of disciplinary problems resulting from physical conflict between white and black students in several Cincinnati public schools. If the Petitioners were successful in getting the prior decisions of the lower courts reversed, the matter would go back to the District Court for the defendants to present their evidence, since the District Court ruled at the conclusion of the plaintiffs' case. Not until after the Respondents presented all of their evidence in the District Court would this case then be ripe for a full and dispositive review by the Sixth Circuit and by the United States Supreme Court. Such a proceeding could keep this case open for another three years. The continuation of this litigation is interfering with harmonious relations between white and black citizens and white and black pupils, and is detrimental to the educational atmosphere in the Cincinnati public schools.

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[3] Even with the extension of time the petitioners served upon William A. McClain, City Solicitor of the City of Cincinnati, a copy of their papers which contain seven pages that were illegible or incomplete.

SUMMARY

In this case, the Sixth Circuit has held that where a public school system is operated on a neighborhood basis without any arbitrary classification of pupils on the basis of race or any other similar discriminatory practice, the mere fact that residential housing patterns bring about some schools that are predominantly black, other schools that are predominantly white, and other schools that have a combination of white and black pupils, does not give the constitutional right to the plaintiffs to attend a racially balanced school.

The Courts have distinguished de facto segregation from situations involving past de jure segregation, in which an affirmative duty to integrate exists: the law is well settled in the United States that there is no constitutional right on the part of students to go to a racially balanced public school if there is racial imbalance caused by residential housing patterns when a public school system administers fairly and impartially a neighborhood school policy.

The appeal which was taken by the petitioners from the District Court to the United States Court of Appeals for the Sixth Circuit was an appeal from subsidiary findings of fact made by the district judge, not from an appealable order. The only appealable order in this case was affirmed by the United States Court of Appeals for the Sixth Circuit and a petition for writ of certiorari was denied by this court in 1967. Furthermore, the petitioners are proceeding in forma pauperis although the record shows that this case has been better prepared and better financed than other cases prosecuted by the NAACP.

This case has been proceeding since 1963 and if the petitioners are successful in reversing the four lower court opinions, the case would be remanded to the District Court for the defendants to present their evidence. The continuation of this litigation is interfering with harmonious relations between white and black citizens and white and black pupils and is detrimental to the educational atmosphere in the Cincinnati public schools.

CONCLUSION

For the reasons stated herein, the Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

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APPENDIX

The petitioners present this case as one of great public policy and represent that the *Deal* case has held that there is a different law that applies in the north from that which applies in the south. There is no difference in the law between the north and the south. In fact, the Sixth Circuit was one of the first Circuits to hold that gerrymandering on the basis of race is unlawful segregation. *Clemons* v. *Board of Education of Hillsboro,* 228 F. 2d 853 (6th Cir., 1956) cert. den. 350 U.S. 1006 (1956). In both the north and the south the law is that the classification of pupils on the basis of race for the purpose of assignment to schools is unconstitutional and must be terminated forthwith.

There is no constitutional right on the part of Negro or white citizens to go to a racially balanced school. In both the north and the south the law is that there is no constitutional duty to balance the races in a public school system that follows the neighborhood school plan without engaging in segregation, that is, without classifying students for purposes of school assignment on the basis of race. In Cincinnati it is possible for any citizen to live in a neighborhood which will enable his children to attend a racially balanced, or a predominantly white, or a predominantly black school. The racial composition of the school which his children attend is purely a function of his residential choice.* This composition changes as parents move from one neighborhood to another.

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* "For most Negroes, to live near family and friends is to live near other Negroes; on a mass basis this will produce a high degree of residential segregation. Residential segregation may have other voluntary aspects. It is sometimes argued by both Negroes and whites that Negroes enjoy a greater measure of freedom in Negro areas where they need not be concerned about getting along in the face of continued slights and discriminatory acts." Carl E. Taeuber and Alma F. Taeuber: *Negroes in Cities, Chicago,* Aldine (1965) pp 22-23.

While the petitioners wave the flag of great disparity between north and south, the fact of the matter is the law is the same in both parts of the country. In reality, the petitioners are attempting to get the Supreme Court to review the case for the purpose of determining that the trial court's findings of fact are clearly erroneous under Rule 52 (a) of the Federal Rules of Civil Procedure. In order to induce this, the Petitioners brief is replete with numerous distortions. The purpose of this appendix is to set forth a detailed summary of the facts in this case in such a way that the facts will be correctly stated.

The Cincinnati public schools are operated by the Cincinnati Board of Education, a creature of statutes passed by the State of Ohio. It is governed by a Board, members of which are elected by voters that reside within the Cincinnati school district. The Cincinnati school district includes all of the City of Cincinnati and some portions of Hamilton County outside the City of Cincinnati. The Cincinnati School Board is politically independent of and autonomous from the City of Cincinnati and from the Cincinnati City Council. The Cincinnati School Board is not subject to the control or regulation of any agency of the City of Cincinnati, including the Cincinnati Planning Commission, a quasi independent body established under the Charter of the City of Cincinnati, whose members are appointed by the Mayor of Cincinnati with the approval of City Council. The Cincinnati School Board has the power which it has frequently exercised to overrule recommendations of the Cincinnati Planning Commission. The Cincinnati School Board selects school sites, not the Cincinnati Planning Commission.

The Cincinnati public schools are operated on what is

known as a K-6, 3,3 system of organization. Translated from teachers' jargon, that label simply refers to the fact that pupils go to a neighborhood elementary school close to their homes from kindergarden through the Sixth grade; thereafter, they go to a junior high school for three years, and to a senior high school for three years. Some years ago most junior and senior high schools were on joint campuses. Prior to commencement of this litigation, after a study by the Ohio State University Bureau of Educational Research and Service, the Cincinnati public schools adopted a policy to remove junior high schools from the several senior high schools' campuses and to construct a number of junior high schools in each senior high school district. This policy was undertaken to relieve overcrowding in the high schools.

Attendance zone boundary lines for respective schools are determined by the Superintendent, pursuant to provisions of Sec. 3313.48 of the Ohio Revised Code, which provides:

> "The Board of Education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (Emphasis added)

The Cincinnati Board of Education has applied the foregoing statute in accordance with what is commonly known as a neighborhood school policy. A senior high school attendance zone is made up of the attendance zones of nearby junior high schools which in turn derive their pupil populations from nearby elementary schools. Topographical characteristics of Cincinnati, combined with man-made barriers such as railroads, public thoroughfares, and

expressways compel the following of irregular lines and patterns in delineation of the various attendance zones.*

In addition, the Respondents have adopted a policy to avoid predominantly Negro schools, to the extent that the Respondents have any control over the causes which create such predominance, insofar as this can be done without abandoning the neighborhood school policy.

The following are the only exceptions to the neighborhood school policy:

(a) Walnut Hills High School and Junior High School, a district-wide special college preparatory school, to which admission is based upon recommendation of the elementary school principal and upon IQ and Achievement tests. The program in this school is identical in every respect to the academic program offered throughout the secondary portion of the Cincinnati Public School System, except that it includes foreign languages at the Seventh and Eighth grade levels.

(b) Courter Technical High School, a four-year high school, admission to which is restricted to students who have attained certain averages in their prior studies. This school offers special technical programs not available throughout the secondary system. Students from any geographical area in the Cincinnati school district are eligible for admission to this school, provided they meet the academic requirements.

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* The terrain in and around Cincinnati is very rugged and hilly. Thus, while two schools may appear on the map to be close to each other, there may be a difference in elevation that is so great that travel from one school to the other involves substantial distance and unreasonable inconvenience. The ruggedness of the terrain is such that an illiterate Irish immigrant who was an ancestor of one of the attorneys for the School Board commented upon first seeing Cincinnati after years as a pioneer farmer in the great plains of Iowa:

> "'Tis a good thing they built a city there for, 'tis good for nothing else."

(c) Special programs for physically, mentally, and emotionally handicapped pupils that are organized on a district-wide basis to meet the needs of pupils with special problems in the Cincinnati School System.

Within the Cincinnati Public School System there are schools that represent every combination of pupil population as far as the mixture of the races is concerned. In many of these schools there was a dramatic change in the racial composition of the pupil population shortly before this lawsuit was filed, even though there was no change in the attendance zone boundary lines. This change was the result of the mobility of Negro citizens from one part of the city to another.

In the Opinion of the Court of Appeals for the Sixth Circuit on the first review of this case [*Deal* v. *Cincinnati Board of Education,* 369 F. (2d) 55 at p. 64, (1966)], the trial court was quoted as follows:

> "However, in his opinion he adopted as fair the following statement taken verbatim out of the School Board's brief:
>
> 'The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve.'
>
> "Then after discussing the issue of imbalance, he stated:
>
> > "Their [Appellants'] failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is

> here found that the plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof. * * *' "

The Court of Appeals in its first consideration of this case did not disagree with the trial court's findings, but merely remanded it to the trial court for subsidiary findings in order to "present an adequate basis for review by this court." Thus, the main questions presented to the Court of Appeals in its second review were two:

1. Did the trial court comply with the Court of Appeals' mandate to make subsidiary findings of fact suitable to provide the basis for a review of the general finding;

2. Were the findings by the trial court substantiated by the evidence or were they clearly erroneous?

There was no other question before the Court of Appeals on the second review. The second review had to do exclusively with the factual foundation of the trial court's opinion.

In applying these questions to the supplemental memorandum and findings of the trial court, it must be remembered that the trial judge had before him a great quantity of documentary evidence, as well as a transcript of the testimony of several witnesses presented by the plaintiffs. It is apparent from an examination of the several documents that the thousands (perhaps hundreds of thousands) of school administrators' decisions that were in one way or another reflected in this documentary evidence were all made in individual situations that were highly complex. It cannot be doubted that the school administrators had to weigh the information that is contained in this documentary evidence as well as whatever other information may have been presented to them orally in light of their longstanding

experience as professional educators and arrive at a judgment in each particular instance based upon its own educational merits. It will become apparent from an examination of the record that each of these thousands of decisions involved highly complicated fact situations. It may be that in individual decisions, the professional educators made mistakes; it may be that in individual decisions the professional educators had faculty judgment; and it may be, regardless of whether the decisions made by the professional educators were right or wrong, their decisions might have been different from the decisions that would have been made by members of this Court had this Court been called upon to make the same decisions under the same circumstances; but it is quite another thing to say that the thousands of decisions that were made from time to time, as they are reflected in the evidence in this case, constituted either an actual or an apparent abuse of discretion or an apparent abuse of discretion.

HISTORY

The history of the Negro education in the Cincinnati Public Schools is contained in Joint Exhibit 2 (85b). Prior to 1849 public education was not available for Negroes in Cincinnati. In 1848 the Ohio General Assembly passed a statute that required education for Negroes at public expense. 46 Ohio Laws 81-83. In 1849 the Ohio General Assembly made it mandatory for township trustees or incorporated towns or cities to provide separate facilities for the education of Negro children, unless the white citizens were willing for Negroes to attend school with their children. 47 Ohio Laws 17-18. In 1887 the Ohio General Assembly repealed the law that required separate schools for Negroes. In a special report to the Board of Education, E. E. White, Superintendent of Schools, stated on May 30, 1887:

> The colored youth of Cincinnati now have the same right to attend the public schools of the district in which they reside that the white youth have, and when they apply for admission, they must be received on precisely the same terms as white youth.

According to Joint Exhibit 2 (94b), Superintendent White reported in the 60th Annual Report of the Public Schools of Cincinnati for the school year ending August 31, 1889, that Negro youth were "in nearly every [school] building in the city and their presence no longer causes comment."

In 1919 there were requests from 6,487 parents for a school to accommodate Negro students who voluntarily chose to attend it (98b-99b). In the 1920's there was widespread belief among the Negro community that they should have special schools available to them on a voluntary basis. At no time was a student required to attend one of these non-districted schools; at all times all students, Negro and white, were permitted to attend neighborhood schools on the same basis, regardless of race. Four such non-districted optional schools were established. These were Jackson, Sherman, Stowe and Douglass. In 1953 Jackson, Sherman and Stowe Schools became district schools. In 1955 Douglass School became a district school. Of these schools, Jackson School was closed in June 1961; Sherman was closed in June 1957; and Stowe was discontinued in June 1962. (Joint Exhibit 53, 176b-178b)

The petitioners claim that when these schools were assigned specific attendance zone areas like the rest of the schools in the system, their attendance zone boundary lines were established on the basis of race. There is nothing in the record to suggest that it was even remotely possible to assign attendance zone boundary lines to these schools in such a way as to include white neighborhoods, much less

in such a way as to balance the races in these schools. Indeed, a comparison of Joint Exhibit 8 (a map prepared by the University of Cincinnati Department of Geography showing the Negro residential areas in Greater Cincinnati, 112b) with Joint Exhibits 271 and 272 (maps prepared by the Cincinnati Planning Commission which show school locations, 112b, 165b and 166b) shows that it would not be possible to assign attendance zone boundary lines to these schools in such a way as to incorporate areas where a meaningful number of white people reside. No matter how the Superintendent of Schools might have exercised his discretion in the assignment of attendance zone boundary lines to these schools, the facts and the record show that there is no alternative consistent with the provisions of Section 3313.48, Ohio Revised Code, that would have made it possible for the Superintendent to have assigned attendance zone boundary lines to these four schools in such a way as to balance races. Again, the statements of the plaintiffs are largely irrelevant to the issues because Jackson, Stowe and Sherman Schools have all been abandoned as elementary schools since an Urban Renewal Project known as Queensgate I have vacated their neighborhoods of population.

The trial court found that these decisions were not made on the basis of race. This finding is not only not "clearly erroneous," but is supported by the record.

DIVISION OF WITHROW HIGH SCHOOL ATTENDANCE ZONE INTO FOUR PARTS

In 1962 the Cincinnati Public Schools published a book entitled *Survey of School Plant Needs, Cincinnati Public Schools.* This was prepared by the Division of Research, Statistics and Information of the Cincinnati Public Schools in consultation with School Plant Division, Bureau of

Educational Research and Service, College of Education, The Ohio State University. This was a comprehensive study of the existing school plant and the projected Cincinnati needs for school facilities. The report contained detailed recommendations for construction of a number of schools. The report was received in evidence as Joint Exhibit 251. A small portion of it is reproduced in appellee's appendix, page 125b et seq. An examination of the map at page 157b in Joint Exhibit 251 and Joint Exhibit 272 at page 166b shows by visual comparison that the Withrow attendance zone is the largest of the secondary attendance zones in the city. At the time this study was made there were both junior and senior high schools on the Withrow campus to serve the entire Withrow zone for grades 7 through 12. In 1960-1961 the Withrow Senior High School had a capacity of 1,800 students and had a pupil population of 1,719 students. Withrow Junior High School had a capacity of 1,200 students and a pupil population of 1,385 students (155b). Included in Joint Exhibit 251 is a table that shows the estimated probable average daily membership in the Withrow Senior High School area 1961 through 1976. This shows a projected increase in both the senior and the junior high school in the Withrow area well above the physical capacities in existing schools.

In order to accommodate the then existing overcrowding and the projected expansion of the population in this area, the Cincinnati School Board decided to construct four junior high schools in the Withrow attendance zone. These are shown on Joint Exhibit 272 (166b). They are Sawyer in the western portion of the Withrow attendance zone and three junior high schools to cover the eastern portion of the Withrow attendance zone. These are Lyon in the northeastern portion of the attendance zone (Madisonville), Eastern Hills in the southeastern portion of the

attendance zone (Mt. Washington), and Mt. Lookout, located in the east central portion. These locations are all indicated on Joint Exhibit 272 (166b). Examination of population distribution map (131b) and street pattern as shown on Joint Exhibit 272 (166b) shows that the portion of the Withrow attendance zone that is serviced by the Sawyer Junior High School is the most densely populated and in the most built-up portion of the Withrow School attendance zone. To locate a junior high school in this area is a difficult task. It was constructed on the site of an abandoned elementary school that happened to be located adjacent to a city park. This problem of land economics forced the construction of the Sawyer Junior High School on the eastern edge of the area to be served by it. The petitioners criticize the eastern attendance zone boundary line, but they fail to recognize physical facilities problems with which the defendants had to cope. If the eastern Sawyer attendance zone boundary line had been moved to the east the school would have been too crowded to have accommodated the students that live west of it. If the eastern boundary of the Sawyer attendance zone had been moved west, the Sawyer Junior High School would not only be situated outside its attendance zone but the students thereby excluded from Sawyer would be unreasonably far from the Mt. Lookout, the Eastern Hills (Mt. Washington) and the Lyon (Madisonville) junior high schools.

Petitioners also criticized the boundary line for Eastern Hills Junior High School (Mt. Washington) because the Lincoln Elementary School was not included in its attendance zone. The plaintiffs claim that this decision was made on the basis of race. The record discloses in the testimony of the Superintendent on the reason Eastern Hills Junior High School did not include the Lincoln Elementary School in its attendance zone:

> We had a certain amount of money to build a junior high school in the Mt. Washington area. If we would have put the Lincoln in, it would have taken a larger school than we had money to put into it, and that's really the reason it wasn't put out there.
>
> In addition to that, the Lincoln School District was closer to Withrow at the time and after weighing the possibility of putting Lincoln out there (Mt. Washington) we backed up and changed that. (88a)

Petitioners' argument with reference to the Lincoln School implies that it was attended predominantly by Negro students and that, therefore, race was a substantial consideration in its non-inclusion in the Eastern Hills Junior High School attendance zone. The fact is that there were only 25 Negroes in the Lincoln School that would have been affected out of a total enrollment of 528 pupils (Joint Exhibit 53, 173b-178b; Joint Exhibit 146, 310a).

In connection with these four schools the trial court below made the following supplementary finding:

> The survey of school plant needs called for four junior high schools (in Madisonville, Mt. Washington, Mt. Lookout, and Walnut Hills - Evanston) in the Withrow School District. While junior high schools were in construction or contemplation in these areas, a large population shift occurred involving a large influx (predominantly Negro) into Walnut Hills and Evanston. This gave rise to contentions that attendance zone boundary lines were determined on a basis of race, but the evidence establishes that such was not the case and that the determination of the lines constituted a reasonable exercise of discretion by the superintendent.

The complexities of these problems are merely summarized in the evidence in the record; nonetheless, it is apparent that the superintendent was confronted with rather difficult

and complicated decisions. On the basis of the record it is proper to conclude that the District Court's finding not only should not be reversed as "clearly erroneous" but is well supported by the total record of this case.

BRAMBLE – MADISONVILLE

On March 9, 1964, the Board of Education adopted a policy which is contained in Stipulation 11:

> (1.) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R. C. that schools be located where they will be most convenient to the largest number of students.
>
> The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines as -- safety of children, travel distance and capacity of school.
>
> (2.) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other programs to attempt to balance race as such. (54b-55b)

The site for the construction of the new Bramble school was selected before the adoption of this policy "to avoid predominantly Negro schools to the extent that the Board has any control over the cause which creates such a predominance." The school was planned purely to accommodate children, without regard to race under the tradi-

tional "color blind" approach that had been followed by the Cincinnati Public Schools for many years. As the Superintendent testified, "No, we planned it just for children, you know, we paid no attention to what the situation was going to be with reference to Negro and white." (244a) After the school was close to completion, the policy set forth in Stipulation 11 was adopted and the attendance zone boundary lines for the Bramble school were arranged so as to adopt a modified "Princeton Plan" in conjunction with the nearby Madisonville school. The plan involved using the Bramble school for kindergarten and the first three grades of students living in proximity to that school, and using the Madisonville school for the upper three grades for the Bramble school attendance zone and all grades from kindergarten through sixth from the area immediately surrounding Madisonville school. The effect of this new approach is explained by the Superintendent in his testimony:

> The significance of the policy, Mr. Carter, was that if we had carried out as originally planned, Bramble would have been a six year school, a six-grade school, and it would have a sixth-grade school, and it would have taken all the children in the Bramble area and this would have been predominantly white, and so you would have actually been taking white children that are now in Bramble out, and you would have practically no Negroes that are in Bramble in Madisonville. You see what I mean? (244a)

As a result of the adoption of this policy, every student in the Bramble area goes to the Madisonville school after he completes his third grade. Thus the accident of demography that places more white pupils in the area near Bramble than there are Negroes and more Negro pupils in the area near Madisonville than there are whites is

counteracted by causing all of the children in the predominantly white Bramble vicinity to attend Madisonville in a predominantly Negro vicinity during three of their first six years of schooling. This is an approach that has been used in Princeton, New Jersey, and widely praised by civil rights organizations. The topography and the man-made barriers have made it difficult to find other situations to apply this "Princeton Plan" in Cincinnati.

EVANSTON — HYDE PARK

The boundary line between the Evanston Elementary School and the Hyde Park Elementary School was changed during the 1956-57 school year. Joint Exhibit 53 shows that Evanston pupil population rose from 287 in 1950-51 to 927 in 1960-61 (175b). Joint Exhibit 251 in Table 3.8 shows the capacities and average daily memberships in elementary schools in Cincinnati in 1960-61. Evanston is listed with a capacity of 480 and a pupil poulation of 927, with an overcrowding of 447 (139b). A bar chart at 234b which is based upon the data in Joint Exhibit 53, shows the rapid change that the Evanston School underwent as far as the racial composition of its pupil population. It took from 1951 to 1956 for it to reach 40% Negro pupil population.* The next year is was 50% Negro, the following year 70% Negro, and the third year more than 90% Negro. Thus, in three years this school went from a racially balanced school to an almost entirely Negro school. At the same time the pupil population exploded in this school from 289 in 1950 to 884 in 1960, and 1,223 in 1964. The attendance zone lines remained relatively constant during this period, but because of a large influx of

* The neighborhood's racial composition was changing and it hit what sociologists call the "tip point" at about 40% Negro. See *Sociological Appendix*, 255b, 263b.

new pupils into the attendance zone, the school became predominantly Negro and heavily overcrowded. In addition to the foregoing facts, the record contains the following testimony:

Q Mr. Pierce, you have already testified in this case. I want to direct your attention to some points in the stipulation which have been agreed to so far as the proof of the fact is concerned, but objected to on other grounds by the plaintiffs.

First stipulation No. 54, on page 47 which relates to the change in the attendance zone line for the Evanston-Hyde Park boundary.

Do you have that before you?

A Yes, I do.

Q Can you, please, explain that to the court?

A Yes. I think it was the summer of '56, a delegation of parents appeared to ask that this section be transferred. This was refused at that time. It was studied during the rest of the year, and in September of '57 it was transferred.
It was transferred based upon the enrollment problem that we had in Evanston. If you look at the enrollment figures you will note that this was during a climbing population — period of climbing population in Evanston, and we had some classroom space in Hyde Park. This area was the closest to Hyde Park — and was adjacent to it — that we could move, and so it was moved.

Q Now, was there any consideration given to race in effecting that change?

A No, there was not. However, I think it is important to note that while — when it was transferred it was predominantly white, it is now predominantly Negro, that particular section, and it is from that source that many of the Negro children in the Hyde Park School come. (36-2b)

The Negro pupil population in the Hyde Park School in the 1964-65 school year was 15.69% and according to the Superintendent's testimony (36-1b-36-2b) a substantial portion of these Negroes come from the area that was transferred from the Evanston School attendance zone. The practical effect of this change in attendance zone boundary lines was to increase the balance of races in the Hyde Park School, to relieve overcrowding in Evanston and to have no effect on the racial composition of the Evanston pupil population.

An examination of the statistical data summarized at the beginning of this section indicates that the assertion of the petitioners in their Court of Appeals Brief at page 16 "as a result of this redistricting the Evanston School jumped from 50.2% Negro during the 1956 school year to 72.8% Negro the following year," is preposterous. This change involved a relatively small number of children and had no significant effect upon the racial composition of Evanston Elementary School. Examination of Joint Exhibit 54 (191b and 197b) shows the pupil population in Evanston increased from 619 in 1956-57 to 672 in 1957-58, even though a portion of the attendance zone was transferred to the Hyde Park School. It will be recalled that Joint Exhibit 251 (139b) lists the Evanston School as having a capacity of 480 pupils.

The trial court found as follows:

> The controversial change in the attendance zone boundary line between the Evanston Elementary School and the Hyde Park Elementary School in 1956-57 temporarily increased the number of Negroes in the predominantly white Hyde Park School, but was without lasting effect on the racial composition of the Evanston School. The change was made to correct a condition of overcrowding at Evanston and to take advantage of available vacant space in Hyde Park.

In the light of the record summarized above it is not only impossible to say that the trial court was clearly erroneous, but it is apparent that the record substantially supports the court's finding.

MILLVALE TRANSPORTATION

During the school year 1955-56, 306 pupils were transported by five buses at the expense of the Cincinnati Board of Education from South Millvale in the attendance zone served by Washington Elementary School to Douglass Elementary School. During the 1956-57 school year, 243 pupils were so transported by four buses. During the 1957-58 school year, 208 pupils were so transported in three buses. Almost, if not all of these pupils so transported, were Negroes. Similar transportation of students from the Garfield attendance zone to the Burdett School was done at the same time in accordance with the following table:

Year	No. of students	No. of buses
1955-56	274	4
1956-57	165	3
1957-58	222	4

The capacities and membership of the Burdett and Douglass Schools in the years 1954 through 1959 are shown in the following tables:

		Memberships				
School	Capacity	1954-55	1955-56	1956-57	1957-58	1958-59
Burdett	630	341	429	357	603	518
Douglass	800	415	682	825	777	638

The capacities and memberships of the Millvale primary school and the schools in certain nearby elementary districts are as follows:

School	Capacity	Memberships 1954-55	1955-56	1956-57	1957-58	1958-59
Millvale Primary	810	...	...	...	...	835
Central Fairmount	470	363	362	382	321	351
Chase	665	558	519	459	474	506
Garfield	835	788	969	997	1,001	760
Kirby Road	770	734	713	634	658	677
North Fairmount Primary	395 (715)*	226	265	249	244	267
North Fairmount	770	652	741	740	747	730
Roosevelt	440	384	367	396	396	414
Washington	1145[1]	1441[2]	1359[2]	874	960	923

The number of rooms available in schools in the general vicinity of the Millvale area and near the route used to transport pupils from the Millvale area to the Douglass School are shown in the following table:

School	1954-55	1955-56	1956-57	1957-58
Chase	1½	3	3½	4½
Kirby Road	None	1	2	1
N. Fairmount Primary	4	4	4	4
N. Fairmount	2	None	None	None
Central Fairmount	3	3	1	5
Roosevelt	1	1	None	1-temporary
Washington	None	None	8	4
Fairview	None	None	None	None
Schiel	None	None	None	None
Clifton	None	1	1	None
Garfield	4	None	None	None

* Capacity available in 1958-59 when new building was completed is shown in parentheses: includes both old and new building.

[1] Capacity shown is for the elementary classroom building only; a second building containing shops and a gymnasium was also used prior to 1956-57 which reduced the membership in the main building — the shop building was abandoned in June 1956 and all pupils in grades 7-9 were assigned to other schools.

[2] Membership figures include pupils in grades K-9.

The Petitioners argue from the foregoing* and similar statistics that the Cincinnati Public Schools should not have transported the students in one group to the same school, but should have scattered the students among several different schools. They argue that if this latter policy had been followed there would probably have been a better racial mixture of pupils.

The transportation in the Millvale area became necessary because a new Metropolitan Housing Authority project which brought a great influx of families to this neighborhood and greatly overtaxed the physical capacities of the Garfield and Washington Elementary Schools that normally would have served the neighborhood. It had been the announced intention of the Metropolitan Housing Authority that this housing project be an integrated project; however only Negro families established their residences in the project.

For a period of time the Cincinnati Public Schools were confronted with an emergency of overcrowding in this neighborhood and the Superintendent found that he had sufficient space in Douglass School to accommodate all of the students that could not be accommodated in the Washington Elementary School and sufficient space in the Burdett School to accommodate all of the students that could not be accommodated in Garfield School. During the emergency period from 1954 through 1958 there were other schools in the general vicinity which at various times did have vacant classrooms, as shown in the above tables. However, none of these schools had enough vacant classrooms throughout this entire emergency period to accommodate the excess Millvale students. The Superintendent had the alternative of shuffling small groups of students from

* The foregoing statistics are all taken from Stipulation 34, 68b-73b.

school to school each year or transporting all of the pupils as a group to school space which could accommodate them all throughout the entire period of emergency. The Superintendent chose this latter course of action because it was administratively more efficient, it was more economical, and it made it possible to transport all of the students in the same neighborhood from the same school attendance zone entirely to another school attendance zone. It also avoided the probability of having children of the same family in different schools at the same time, and it imposed fewer impediments to building good relationships between the home and the school than would have the alternative proposals. The Superintendent was required to deal with this complex administrative problem and he exercised his discretion reasonably, pursuant to his power and duties under the Ohio law. His exercise of discretion did not constitute an unlawful abuse and was not undertaken for the purpose of artificial separation of races.

This transportation was discontinued in 1958 because a new school was completed to accommodate Millvale pupils in their neighborhood of residence.

The testimony of Superintendent Pierce is as follows:

Q Isn't it a fact that there was capacity available in North Fairmount and North Fairmount Primary?

A No.

Q North Fairmount Primary, according to Stipulation 34, page 29, had a capacity of 395 students, and in 1954 they had a membership of 226. Now, isn't it a fact that there was capacity available in that school year?

A That isn't the fact you gave me, though. You asked me if they could take the children from Millvale, and I said no, because when you took the total number of children — a whole concept when we moved the children out of Millvale was to move

> them in toto, so that we could pull them back in toto. We could have spread them in small groups in a number of different schools. And there are two or three reasons for not doing that, Number One is transportation becomes a problem if you take them in small groups in terms of cost. Number Two is that you have families tied into a number of different schools.
>
> So we attempt to move a school, when we have one like Millvale, en masse, someplace, and we looked for the closest place we can take the whole group to one place, if we can. (98a)

The trial court summarized in detail the facts stated above and concluded:

> The solution adopted by the superintendent constituted a reasonable exercise of his discretion, pursuant to his power and duties under the law of Ohio. This exercise of discretion did not constitute an unlawful abuse thereof and was not undertaken for the purpose of artificial separation of races.

On the basis of the record of this case it is not only impossible to say that the trial court's finding was "clearly erroneous"; on the contrary, it is well-supported by the facts and evidence.

HAYS – PORTER SCHOOLS

Hays Elementary School and Porter Junior High School are located on the same campus and in the same building in an area in Cincinnati known as "the West End." Joint Exhibit 271 (165b) shows Hays located in an area a short distance west of the central business district area of the City of Cincinnati. A similar indication is made for Porter on Joint Exhibit 272 (166b). Joint Exhibit 8 (112b) is a map prepared by the University of Cincinnati Depart-

ment of Geography which shows Negro occupancy in residential areas in the Greater Cincinnati area. The area immediately west of the central business district on this map where the Porter and Hays Schools are located is an area that is occupied almost entirely by Negroes. It is apparent from the examination of Joint Exhibt 8 that there is no practical way to designate attendance zone boundary lines for Hays or Porter schools in such a way as to encompass the neighborhoods with any substantial white population.

In connection with the establishment of these schools the Petitioners refer to Stipulation 63 which contains quotations from Administrative Conference Notes at pages 59-62. An examination of these excerpts show that as early as 1948 the Administrative Conference was attempting to solicit white teachers to teach in predominantly Negro neighborhoods of the West End and also seeking acceptance of white teachers among the Negro residents. In addition, in the 1948 Administrative Conference there is an indication of acceptance or a program for school expansion that "precludes continuance" of the non-districted voluntary schools for Negroes. Thus six years before *Brown* the Administrative Conference of the Cincinnati Board of Education was already at work at eliminating voluntary schools for Negroes and at the integration of school faculties.

OYLER JUNIOR HIGH SCHOOL

The Petitioners point to the fact that Oyler Junior High School is in the Hughes High School attendance zone rather than in the Taft High School attendance zone. The Petitioners then called the Trial Court's attention to the fact that Hughes High School has a racially balanced pupil population in that the percentage of Negroes in Hughes Junior High School as shown on Joint Exhibit 53 is approxi-

mately the same as the percentage of Negroes in the overall pupil population of the Cincinnati Public School system; whereas the Taft High School is 85.5% Negro. These facts standing alone do not constitute evidence of gerrymandering on a racial basis. Petitioners completely failed to offer any evidence that it was equally convenient on the basis of public transportation routes to go to Taft or to Hughes. Petitioners failed to offer any evidence as to whether or not Oyler Junior High School students actually enter high school and if so how many. Petitioners completely failed to offer any evidence whether the inclusion of Oyler in the Taft attendance zone would make Taft a racially balanced school or whether Taft would remain predominantly Negro. Similarly the Petitioners failed to offer any evidence to show whether or not the transfer of Oyler out of Hughes would thereby make Hughes a racially unbalanced school and possibly cause Cincinnati to have two racially unbalanced high schools rather than only one. In short the Petitioners' evidence left in the realm of speculation, conjecture, and surmise all of the essential facts necessary to show the consequences of the present assignment of Oyler to the Hughes High School attendance zone.

The Petitioners have a complete failure of evidence to show any causal relationship between the attendance zone district boundary lines of Hughes and the racial composition of either Hughes or Taft. Without this information it is impossible for the Court to conclude anything with respect to the consequences of the present attendance zone boundary lines. Without a knowledge of the consequences it is impossible to infer an intention either to segregate or to balance races, as the case may be.

ACH JUNIOR HIGH SCHOOL

The Ach Junior High School was opened in September of 1950 in what had been formerly the Avondale Elementary School. The Ach attendance zone included the Roselawn Elementary School attendance zone and the Bond Hill Elementary School attendance zone. Students from these areas were given the option to attend either Withrow Junior High School or Ach Junior High School during the 1951-52 school year. Prior to the opening of Ach Junior High School, students from these areas had been assigned to Withrow Junior High School. The option to attend Withrow Junior High School terminated in September 1953 when pupils from these attendance zones were assigned to Woodward Junior High School which opened in September 1953 (Stipulation 59). During this time of transition both Ach and Withrow Junior High Schools had surplus capacity and both had a proportionate representation of Negro and white students as shown by the following table:

School	Capacity	Membership 1950-51	Membership 1951-52	% of Negro Estimated Pupils 1950-51	% of Negro Estimated Pupils 1951-52
Ach	950	655	755	32.3	39.1
Withrow	3,300	2,960	3,054	11.4	12.2

After the students from Roselawn and Bond Hill Elementary Schools had been assigned to Woodward, Ach Junior High School became overcrowded in 1955-56 (Joint Exhibit 54). In the period between September 1953, when Woodward was opened and the school year 1964-65 the percentage of Negro pupils in North Avondale School increased from 0.91% to 74.36% (Joint Exhibits 53 and 54). The North Avondale School was not removed from the Woodward Junior High School attendance zone. At the time of the trial the percentage of Negroes in Woodward Junior High School was 20.96%.

These were routine administrative decisions that were made by the Superintendent in the course of the execution of his duty to determine the attendance zone boundary lines for particular schools. Each of these decisions involved the weighing of many complicated factors only a portion of which are contained in the record of this case. The Petitioners offered no evidence to show that these decisions were made with a racial purpose in mind, or to accomplish any particular racial objective or goal.

The trial court made the following finding with regard to Ach Junior High School:

> The opening of Ach Junior High School in September 1950, precipitated changes in attendance areas of Withrow Junior and Woodward Junior High Schools. These resulted from routine administrative decisions rather than any racial consideration. The evidence establishes that pupil assignments were based upon school building capacities and the requirements of increasing numbers of children.

The record is such that it is not possible to say that the trial court's finding was "clearly erroneous"; on the contrary, the record supports the court's determination.

AIKEN HIGH SCHOOL

The Aiken High School was opened as a new school in September 1962, and is located in an area of Cincinnati known as College Hill. The Clifton Elementary School is located in an area known as Clifton and is approximately 3.9 miles from Aiken. Clifton and College Hill are located on separate hills divided by a valley, but are connected by the Ludlow Avenue Viaduct. The Clifton School is approximately one and one-half miles from Hughes Junior High School and Hughes Senior High School. There is direct bus transportation from the Clifton area to the College Hill area and from the Clifton area to the Hughes High

School area. Garfield Elementary School is in the Cumminsville area. The distance from Garfield to Aiken High School is approximately 3.3 miles and the distance from Garfield School to Hughes High School is approximately 3.6 miles. Garfield students are assigned to Hughes Junior and Senior High Schools. Garfield students travel by means of regular bus lines operated by the Cincinnati Transit Company.

School membership for the first year (1962-63) at Aiken High School exceeded the number of pupils expected in grades 9, 10 and 11 by approximately 200. Grade 9 alone exceeded the number of grade 8 pupils residing in the district in June 1962 by approximately 100. Because of this unanticipated expansion of student pupil population and in recognition of continuing residential construction in the area, the Respondents gave consideration to means of accommodating pupils in the Aiken High School and Schwab Junior High School attendance zones in the 1963-64 school year. One plan that was considered to avoid excessive overcrowding in both Aiken and Schwab was to assign some grade 9 pupils from Chase, Kirby, Winton Place and Winton Terrace Elementary attendance zones to Central High School and to retain grade 9 pupils from the Clifton Elementary district in Hughes High School. Public protest * over this plan of assignment induced the Respondents to survey all parents of pupils affected to determine whether they preferred assignment in accordance with the announced plan or assignment to Schwab Junior High School under extremely crowded conditions. The survey revealed that more parents had decided to enroll their children in a technical program regularly offered at Central High School than had been anticipated on the

* (Central High School has been known as a "trade school" and some parents did not want their children to attend a school with this label.)

basis of experience of previous years, and the number of pupils who wished to attend Schwab was about 120 rather than 170. With this reduced number of pupils in prospect, it was decided to assign pupils in the area in question to Schwab Junior High School and to retain grade 9 pupils from the Clifton Elementary attendance zone in Hughes High School where they had been attending in grade 8.

The original plan and the revised plan were intended to be for the year 1963-64 only and this intention was publicly announced and carried out. Action had already been taken in 1962 to enlarge Aiken High School to cope with the increasing school memberships then in prospect and this fact was public knowledge at the time the change in pupil assignment was under consideration. The revised plan gave exactly the same relief to Aiken School as would have been expected from the original plan.

Building capacities and memberships in schools affected by opening of Aiken are as follows:

School	Capacity	Memberships 1961-62	1962-63	1963-64	1964-65
Aiken	850 before Sept. '64 1400 in 1964-65	....	1,020	1,205	1,454
Hughes	2,600	2,447	2,498	2,796	3,049
Schwab	850	1,163	930	1,148	1,128
Western Hills	2,320	2,786	2,997	3,181	3,329
Woodward	2,900	3,082	3,124	3,144	3,336

(Stipulation 52, 80b)

The estimated percent of Negro pupils in the schools affected by the opening are as follows:

School	1961-62	1962-63	1963-64	1964-65
Aiken	Not available	Not available	4.9	6.6
Hughes	"	"	26.2	31.3
Schwab	"	"	9.2	15.3
Western Hills	"	"	0.6	0.6
Woodward	"	"	11.2	15.2

(Stipulation 42, 81b)

It is to be noted that after these changes took place none of the schools was predominantly Negro, and one school, Hughes, was a racially balanced school, in that the Negro pupil population was approximately at a percentage level that corresponded to the percentage of Negroes then in the pupil population of the Cincinnati Public Schools.

The details of the boundary line determination for Aiken High School obviously involved a complicated analysis of numerous facts and an enormous quantity of data. The decisions were made by the Superintendent in consultation with fellow professional educational administrators on the basis of his professional judgment as to the most appropriate way to provide school accommodations for pupils who required these accommodations. The Petitioners offered no evidence to show that these determinations were made on the basis of race. No legally consequential effect of these decisions on the racial composition of these schools has been shown by the Petitioners.

In connection with this school the trial court found as follows:

> Aiken High School was opened in September 1962 in an area known as College Hill. Topographical characteristics of that area are even more extreme than in other Cincinnati areas and the establishment of zone attendance boundary lines is accordingly even more difficult, and further complications were created by an unanticipated enlargement of the student population. The decisions made by the superintendent with regard both to Aiken and to schools having co-related problems were on the basis of his professional judgment as the most appropriate way to provide school accommodations, and were not made on the basis of race. No significant change in the racial composition in the schools resulted from these administrative decisions.

It is impossible on the basis of the record to say that the District Court's finding should be overturned as "clearly

erroneous"; on the contrary, the record clearly supports the findings of the trial court.

EVANSTON – OAKLEY

The specific incident that precipitated this lawsuit was temporary emergency transportation of pupils from Evanston Elementary School (a predominantly Negro school) to Oakley Elementary School (a predominantly white school). As has been noted previously the Evanston School was going through a period of rapid pupil population expansion and was overcrowded in such a dramatic way that no one can deny that this was an emergency situation. Joint Exhibit 251 (155b) contains Table 5.4 which shows school capacities, and average daily memberships for schools in the Withrow Senior High School area. Included in that table is the Evanston School which had a capacity of 480 and in 1960-61 had 927 pupils. Joint Exhibit 53 (175b) shows that the pupil population of Evanston School rose to 1,223 pupils in 1964-65, while the capacity of the school building remained constant. Joint Exhibit 151 does show temporary buildings were constructed on the school yard of the Evanston School.

At the opening of the 1963-64 school year 120 pupils from the second and third grades living in the attendance zone of Evanston School were assigned to the Oakley School in order to relieve overcrowding in the Evanston School building. These pupils were transported by bus at the expense of the Cincinnati Public Schools. All of these transported pupils were Negroes. During the school year these pupils were assigned to unused classrooms in the Oakley school building which were not occupied by any students who normally lived in the Oakley School attendance zone. During the noon recess, pupils from all rooms of the school played together on an unorganized basis.

During the morning and the afternoon of each day each teacher is permitted to arrange a 15 or 20 minute organized play period at such time as is convenient for the teacher's program of instruction. During the morning organized play period the pupils of each classroom played together. In the afternoon periods they participated in organized games in conjunction with one other nearby classroom of the same grade.

Requests were made by some of the parents and representatives of some of the parents in May and June, 1963 and again on the date on which the school opened in September 1963, to assign pupils from the Evanston School to the same classrooms in the Oakley School as those to which Oakley pupils were assigned. These requests were denied because it had been a practice of the Cincinnati Public Schools that whenever pupils are transferred from one school to another for one year or for a shorter period of time, such pupils are kept in separate classrooms to facilitate administrative control and transportation. This separation of Evanston students was for one year only (1962-63) and was in accordance with an administrative policy unrelated to any consideration of race. There is no evidence that had the transported students been white instead of Negro that their treatment would have in any respect been different than the treatment received by the Evanston students transported to Oakley.

During September 1963 some of the parents of Evanston pupils assigned to the Oakley School requested that their children be transferred to the Hyde Park School in the event that they would not be assigned to the same classroom as those occupied by pupils from the Oakley attendance zone. This request was denied for reasons that there was not sufficient room in the Hyde Park School to accommodate all the children to be accommodated from the

Evanston School. Similarly, the Superintendent refused to permit transfers of individual pupils.

The following table shows the utilization of rooms at Oakley and Hyde Park Schools:

School	Capacity	ADM 1962-63	ADM 1963-64	Vacant Rooms 1962-63	Vacant Rooms 1963-64
Oakley	990	873	944	6[2]	2[4]
Hyde Park	720	774	814[1]	1[3]	0

[1] Playroom converted to 2 classrooms to add to capacity
[2] 1 used for audio-visual purposes
[3] Used for audio-visual purposes
[4] 1 used for audio-visual purposes

During the 1964-65 school year, pupils who had been assigned to the Oakley School from the Evanston attendance zone continued to attend the Oakley School in the third and fourth grades in order to relieve the continuing overcrowded condition in the Evanston School building. At the beginning of the 1964-65 school year these pupils were assigned to the same rooms in the Oakley School as those occupied by Oakley pupils. These assignments are shown in the following table:

3rd Grade pupils assigned to the 4th Grade 1964-65

SECTION	ROOM	TOTAL NUMBERS	EVANSTON	OAKLEY
41	214	35	12	23
42	211	35	7	28
43	203	30	9	21
44	1	29	8	21
45	208	29	10	19
Third grade failure:		10		

2nd Grade pupils assigned to the 3rd Grade 1964-65

SECTION	ROOM	TOTAL NUMBERS	EVANSTON	OAKLEY
31	112	35	12	23
32	101	35	9	26
33	106	33	11	22
34	10	33	12	21
35	102	30	12	18
2nd Grade failures:		11		

The problem of relief of the overcrowded condition in the Evanston School was a complicated and difficult ad-

ministrative matter. It involved the transportation of pupils a substantial distance from their place of residence from a predominantly Negro neighborhood to a predominantly white neighborhood. The result of this transportation policy was not only to relieve overcrowded conditions in the Evanston Elementary School, but to place a certain number of Negro students from Evanston in instructional conditions where they would have regular and frequent association with fellow students of the Caucasian race. This policy was determined by the Superintendent in the realm of his lawful discretion and did not constitute an unlawful abuse of discretion. It was not undertaken for the purpose of separating races, on the contrary, it had the effect of placing Negro pupils in a predominantly white school.

The facts set forth in the above section of this argument are from Stipulation 33 which has been reproduced in the Appendix of the defendants-appellees at pages 65b-68b.

The District Court made the following finding with respect to the Evanston-Oakley School situation:

> At the beginning of the 1963-64 school year a transfer of pupils was necessary in order to relieve overcrowding of the Evanston School building, predominantly populated by Negro students.
>
> In accordance with the established policy, these temporary transfers, which were accomplished by the use of buses, were of classes which then occupied rooms in the Oakley School, predominantly otherwise occupied by white students. As is indicated by the charts prepared in connection with these various transfers which were received in evidence, difficult and complicated administrative problems were presented. Transportation of pupils a substantial distance from their homes from a predominantly Negro neighborhood to a predominantly white neighborhood was necessary. The determination both of the need for the transfer and the means of accomplishing it was a reasonable exercise of

> the discretion by the superintendent. It was not undertaken for the purpose of separating races, and in fact place them in greater proximity with one another.

The facts contained in the record of this case are such that it is not possible to say that the District Court's finding is "clearly erroneous"; on the contrary, the record clearly substantiates the finding of the District Court.

CO-OP TRAINING

Cincinnati is the home of "Cooperative Education" whereby pupils pursuing technical training devote a portion of their time to work in an industry that makes use of the particular technical skill they seek to acquire. From time to time the Cincinnati Public Schools have had difficulty with the employers who have manifested reluctance to employ Negro co-ops. The problem was caused not by any action of the Cincinnati Public Schools, but by action of certain employers who were seeking to operate their businesses in violation of the Ohio Civil Rights Act. An examination of the record shows that the Cincinnati Public Schools clearly refused to cooperate with any employer who chose to discriminate on the basis of race. In this connection when the Superintendent was interrogated with regard to the Cooperative Education Program he stated:

> I told you in the beginning, when you started talking about this, that this is a problem. We have recognized it as a problem for many years, and we have worked with all agencies in town, we have tried a number of industrial employers, we have talked with intergroup agencies, we have had committee meetings, we have visited companies, we have talked with children, we have talked with our coordinators, we have talked with our counselors. We are deeply involved with trying to correct this. It is not ideal yet.

Q Have you stopped dealing with the corporations that discriminate?

A Yes. (109a-110a)

It is apparent from the record that there is no factual foundation whatsoever for the claim made by the Petitioners with respect to the Cooperative Education Program in the Cincinnati Public Schools.

HOUSING PATTERNS

In an effort to distinguish this case from the earlier de facto segregation cases of *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209 (CCA 7th, 1963), cert. den. 377 U. S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216, and *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (CCA 10th, 1964), the plaintiffs placed reliance on a new theory with regard to action of other governmental agencies. Their theory is best stated by Owen M. Fiss: "Racial Imbalance in the public schools," 78 Harv. L. Rev. 564, 587 (1965). In this publication of a law student's senior paper, Mr. Fiss proposed a theory which has no support in law:

> It might be argued that even if governmental responsibility for residential segregation can be established it would be unfair to hold the school board responsible since it was not the governmental unit that enacted or enforced the residential restrictions. Yet local government need not be conceived as a mere collection of autonomous and unrelated units; in many communities the power connections and links between the units are multifarious. Moreover even if another governmental unit is responsible for the residential pattern, the most that can be said is that this unit and the School Board are both responsible for imbalance in the schools; it would not be unreasonable to think in

> terms of the cumulative impact of actions of both units and to hold particularly responsible the unit that has in its power the most effective method of correcting one facet of the cumulative impact of their actions, racially imbalanced schools.

It was observed by the trial court (145a), there simply is no law to support this novel theory of Mr. Fiss. The City of Cincinnati is "entirely separate legally and factually, from the individual Defendants, as well as the defendant entity of the Board in this case." (145a)

Plaintiffs rely upon *Holland* v. *Board of Public Instruction,* 258 F. 2d 730 (CCA 5th, 1958) and *Dowell* v. *School Board of Oklahoma Public Schools,* 219 F. Supp. 427 (W.D. Okla., 1963). Both of these cases involved school systems that had practiced de jure segregation in the past and had been ordered by the courts to discontinue the practice of segregation. Both of these cases involved situations where the residential patterns had been highly stable and there had been relatively little mobility of the Negro population.

In this case the trial court has found that there has not been a practice in de jure segregation and has not placed the Cincinnati Board of Education under any injunctive order.

In this case there is not a record of the confinement of Negroes to particular areas, on the contrary the evidence shows substantial shift of Negro population from place to place.

The record is abundantly clear that the racial composition of any given school is determined by the racial composition of the neighborhood which the school serves. This is recognized by Loren Miller, a lawyer, who is also vice president of the NAACP and has written the article: "The Protest Against Housing Segregation," 357, *The Annals of the American Academy of Political and Social Science,* 73, 76 (1965) wherein he states:

Schools, parks, playgrounds, Boy Scout troops, political clubs, Parent-Teacher Associations, or churches, to furnish an abbreviated list, take on the color, or lack of it, of the communities in which they function.

Joint Exhibits 9 and 10 (171b-172b) illustrate the kinds of population changes that have taken place in Cincinnati in recent years. The racial compositions of schools have changed rapidly even though school attendance zone boundary lines have remained relatively constant (D. Exhs. 1-6, 233b-248b). This fluctuation in population which has resulted in changes in the racial composition of schools is supported by the testimony of Sanford Wright, a real estate expert, called by the plaintiffs. Wr. Wright testified as follows:

Q And over the period of years, sometimes to a greater degree than others, there have been changes in these neighborhoods, some gradual and some not so gradual, from Negro to white?

A What neighborhoods are you referring to?

Q Well, for example, you have the one over there near the Withrow High School, Evanston, for example, there have been changes in the Evanston area. That was formerly all white.

A Yes.

Q And then it was gradually — some Negroes came in there and then it was predominantly Negro, isn't that true?

A Right.

Q And then that transition took place from Evanston going east, did it not?

A Slightly.

Q Well, slightly, and a greater concentration?

A I wouldn't say we have too much concentration east of Evanston, now.

Q How about Vista Avenue, from Ivy down to Duck Creek?

A There are four or five streets around in there, around Vista Avenue, there are quite a few Negroes around there. * * *

Q So these transitions that have taken place, like, for example, we are speaking of Evanston going over to Vista Avenue, that has covered a span of years, hasn't it?

A Yes, quite a few years.

Q And then more recently we have had such transitions as take place in parts of Kennedy Heights and Silverton?

A Well, there have been Negroes in Kennedy Heights, too, for quite a few years.

Q In a small area and then a larger area?

A Yes.

Q In some of these areas there were 100% white and they have changed over the period of time?

A That's right.

Q And in Evanston, for example, there was a time during this transition when you had — you had to have an exact percentage in ratio of the Negro population to the white population in that area; as it changed from an all-white area to an all-Negro area, isn't that correct?

A Well, I wouldn't say that is correct. You mean to say there had to be a certain percentage?

Q Well, as the percentage changes from zero on up to whatever the percent is, predominantly lets say 80%, there was a period in that area, for example, when the representation of the number of Negroes was in the same proportion as the total Negro population was to the total white population in the city?

A It could have been.

Q And those were just examples, weren't they, Mr. Wright? There were many areas in the city where that occurred. Another one would be Avondale.

A Yes, I guess you could call Avondale another one.

Q As your map shows Avondale, it demonstrates there is a transition going on in Avondale at the very present time, isn't there?
A What part of Avondale, may I ask?
Q Well, from South Avondale to North Avondale?
A It is a pretty stable neighborhood now.
Q But it is changing now?
A It is changing a little.
Q So what we are speaking about when we show these maps is a condition which has changed from year to year going back as far as your memory can go in observing these things in this community?
A Yes, things have changed. (24b-27b)

An inspection of Joint Exhibit 53 "Memberships and Percent of Number of Negro Pupils, by School, Cincinnati Public Schools, 1950-51, 1960-61, 1963-64 and 1964-65" show changes of percentage of Negroes in the Cincinnati Public School System during the past several years. This Joint Exhibit 53 confirms what is illustrated by Joint Exhibits 9 and 10 and what is established by the testimony of Mr. Wright. Parenthetically, it is to be noted that there is no evidence that this series of changes which has gone on as far back as Mr. Wright's memory can recall, is likely to be terminated; therefore, if the Respondents were ordered to rearrange the school system so as to balance the races, this recurring population mobility would require the continued reorganization of the school system in response to this constant shift of people moving from the neighborhood to neighborhood (See Sociological Appendix, 259b-265b).

The chief evidence that the Petitioners have presented to substantiate their claim that housing segregation was caused by governmental action was the testimony of two relocation officers from the Department of Urban Renewal of the City of Cincinnati. These two relocation officers were

a Negro, Joseph Murphy, who was at that time in charge of family relocation for the City of Cincinnati's Department of Urban Renewal and one of his assistants, a Mrs. Clark. Two questions from the trial court produced a summary of the testimony of these two witnesses:

> THE COURT: Mr. Murphy, do I properly understand from you and Mrs. Clark that your office is essentially a conduit for information between persons having property for rent or for sale and people who might desire to either rent or buy?
>
> THE WITNESS: That's correct.
>
> THE COURT: Is that essentially correct?
>
> THE WITNESS: Yes. (21b-22b)

In the sixth year since the complaint was filed in 1963, for the first time in the brief filed for the second review by the Court of Appeals the Petitioners raised the accusation that the trial court "prohibited appellants from showing that the Board and the City of Cincinnati were in fact related . . ." (Plaintiff-Appellants' Brief, page 75) They then proceed to discuss interrelationships between the Cincinnati Planning Commission and the Cincinnati Board of Education. Joint Exhibits 271 and 272 are reproduced in the School Board's appendix. These are maps of actual and proposed school sites that were prepared by draftsmen on the staff of the Cincinnati Planning Commission. Aside from this, no evidence was ever tendered by the plaintiffs with regard to the Cincinnati Planning Commission. It is impossible to see how the trial court "prohibited appellants from showing" that which was never proffered by the plaintiffs in the trial court.

The facts of the relationship between the Cincinnati Planning Commission and the Cincinnati Board of Education are a matter of law. Section 713.02 of the Ohio

Revised Code authorizes the Board of Education or any other governmental agency under the jurisdiction of a local city planning commission to overrule the decisions of the Planning Commission. In addition it is well established in Ohio law that an agency that has the power of eminent domain, as does the Cincinnati Board of Education, is not bound by local zoning regulations. *City of Heath* v. *Licking County Airport Authority,* 16 Ohio Misc. 69; *State ex rel Helsel* v. *Board of County Commissioners, et al.,* 37 Ohio Op. 58, 62; *State ex rel Ohio Turnpike Commission* v. *Allen,* 158 Ohio St. 168, 174, 48 Ohio Op. 115, 117; *Doan* v. *Cleveland Shortline Railway Co.,* 92 Ohio St. 461. Thus it is apparent from the statutory law and the case law of Ohio that location of schools is governed by the Cincinnati Board of Education and not by the City of Cincinnati.

In the trial court's memorandum the following determinations were made:

> Plaintiffs urge that a group of Supreme Court cases have substantially modified the law since the date of the Court of Appeals' decision herein. The cases cited in this context are *Green* v. *County School Board of New Kent County, Virginia,* 391 U. S. 430; *Rancy* v. *Board of Education, Gould School District,* 391 U. S. 443; and *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* 391 U. S. 450, all of which were decided May 27, 1968. However, none of these cases is applicable because each involved a review by the Supreme Court of desegregation plans in school districts that had formerly operated under de jure segregation. So-called "freedom of choice" plans had been adopted in each instance, and it was held that they did not comply with the desegregation requirement of *Brown* v. *Board of Education,* 349 U. S. 294 (1955). In his opinion in the present case, Chief Judge Weick observed, "At the outset it should be pointed out that the State of Ohio abolished segregation in the public

schools on February 22, 1887, which was more than 67 years before the Supreme Court barred it on constitutional grounds in the momentous decision of *Brown* v. *Board of Education,* 347 U. S. 483, 74 Sup. Ct. 686, 98 Law Ed. 873 (1954)." The record herein clearly supports our earlier determination that while segregation in the Cincinnati public education system was practiced between 1849 and 1887, since that date Negroes have attended neighborhood schools on the same basis as white children living in the same locality. The group of cases cited above dealt with situations in which the imbalance between white and Negro children was caused by an act of discrimination on the part of the school authorities, and accordingly present an entirely different situation than that here under consideration.

Speaking for the Court of Appeals in the present case, Chief Judge Weick anticipated the line to be drawn between such cases as the group cited by plaintiff in which a new plan was being put in effect and those like the one before us where a neighborhood school plan had long been followed in this language (369 F. 2d 63): "Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance in the schools is the result of population mobility among the various neighborhoods. In *Dowell* (*Dowell* v. *School Board of Oklahoma Public Schools,* 244 F. Supp. 971 (W.D. Okla. 1965) the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city."

Plaintiffs complain that at the trial of the present action evidence of racial discrimination in the public and private housing market was improperly excluded.

The Court of Appeals made the following observation in this regard (369 F. 2d 60, Note 4):

> "The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board (of Education) has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practices, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code, § 4112.01-07."

Plaintiffs now present the interesting argument that this determination of the Sixth Circuit Court of Appeals "should no longer be controlling" on this Sixth Circuit District Court, but that we should instead follow an opinion of the Fourth Circuit (*Brewer* v. *School Board of the City of Norfolk, Virginia,* 397 F. 2d 37 (4th Cir. 1967)).

STATE OF THE RECORD

This case was decided by the trial court on a motion made by the defendants for an order entering judgment on the grounds that there had been no evidence offered on the support of the allegations of plaintiffs' amended complaint (218a). This motion was based upon Rule 41 (b) Federal Rules of Civil Procedure, which in so far as pertinent provides:

> . . . After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that *upon the facts and the law the plaintiff has shown no right to relief.* The court *as trier of the facts may then determine* them and render judgment against the plaintiff or may decline to render any judgment until the close of the evidence. If the court renders judgment upon the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a) . . . (Emphasis added)

Therefore, the question presented to the trial court was a simple question of fact: viz. whether or not the Petitioners had met the burden of proof required where the extraordinary relief of injunction was sought in showing by clear, certain and convincing evidence that the appellees had been guilty of acts as alleged in the amended complaint which constitute a violation of the constitutional or civil rights of the plaintiffs. This simple question of fact was resolved by the trial court against the plaintiffs and falls within the scope of Rule 52 (a) :

> Findings of facts shall not be set aside unless *clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. (Emphasis added)

Segregation was abolished in Ohio in 1887. 84 Ohio Laws 34; *Board of Education* v. *State,* 45 Ohio St. 555 (1888). Negro students have attended the neighborhood schools on the same basis as white students in the intervening 82 years.

Neighborhood schools are constructed and receive attendance zone boundary lines on the basis of Section 3313.48 of the Ohio Revised Code which states:

> The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.* (Emphasis added)

Until March 9, 1964 race had not been considered in the selection of sites or the designation of attendance zones; however, ever since that time, under the policy set forth in Stipulation 11 (54b-55b), race has been one of many factors considered in the assignment of attendance zone boundary lines. The consideration given race is that the appellees "would like to avoid predominantly Negro schools to the extent that the Board has any control of the causes which create such predominance." The uncontradicted evidence shows that the policy was put into effect in the area of the Madisonville-Bramble Schools where a modified "Princeton Plan" was adopted (244a).

For approximately two and a half years before trial the Petitioners' representatives had unrestricted access to all of the files and records of the Cincinnati Public Schools, and have fully availed themselves of their right of free access by thoroughly searching all of the School Board records to find any evidence of acts or of a policy of segregation or gerrymandering (278a). Every item which the Petitioners considered important from the school records is contained in the Stipulation. An examination of the Stipulation and the Exhibits incorporated therein is the most eloquent argument against the contention that the Cincinnati Public Schools practice or have practiced segregation in the legally relative past.

No school segregation case has ever been decided against a school board where there was positive evidence that the school board takes into consideration the question of the

avoidance of the predominantly Negro schools and adopted a policy similar to the one stated in Stipulation 11 (54b-55b).

A board of education, like any other public body, is presumed to have exercised good faith for the same reason that the trial court stated (121a-122a):

> * * * I have enough idealism to be absolutely convinced, until the contrary is shown, that public servants are just exactly what is connoted by that term. They are serving the public not an individual master.

A court will not interfere with the actions of the defendants unless there is clear evidence of a violation of constitutional or civil rights as manifested by an abuse of discretion or bad faith on the part of the public servants. This is the basis for sustaining the school boards in the following cases:

> *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209, (CCA 7th, 1963), cert. den. 377 U. S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216;
>
> *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (CCA 10th, 1964);
>
> *Lynch* v. *Kenston School District,* 229 F. Supp. 740 (N.D. Ohio 1964), appealed to the Court of Appeals for the Sixth Circuit, but dismissed on motion of the plaintiffs-appellants on July 2, 1965;
>
> *Craggett* v. *Board of Education of Cleveland,* 234 F. Supp. 381 (N.D. Ohio 1964);

This is also the basis of the decision of the United States Supreme Court in the case of *Wright, et al.* v. *Rockefeller, et al.,* 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964), rehearing denied, 376 U. S. 959, 84 S. Ct. 964, 11 L. Ed. 2d 977.

Judge Kalbfleisch cites the United States Supreme Court and the Sixth Circuit for the proposition that:

> * * * Public officials are presumed to have properly discharged their duties.
>
> *Cragett* v. *Board of Education of Cleveland,* 234 F. Supp. 381, 386 (N.D. Ohio 1964), citing the following cases:
>
> *U. S.* v. *Chemical Foundation, Inc.,* 272 U. S. 1, 47 S. Ct. 1, 71 L. Ed. 131 (1926);
>
> *In re State Thread Co.,* 126 F. 2d 296 (CCA 6th);
>
> *Donaldson* v. *U. S.,* 264 F. 2d 804 (CCA 6th, 1959) cert. den. 368 U. S. 938, 82 S. Ct. 379, 7 L. Ed. 2d 337.

It has been consistently the position of the Petitioners that in matters involving allegation of racial discrimination there arises a presumption of bad faith on the part of public officials. In support of this novel proposition appellants cite *McLaughlin* v. *Florida,* 379 U. S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964), a case involving the unconstitutionality of a statute prohibiting cohabitation between two persons of different races. Aside from the fact that this case is clearly distinguishable on its facts, it by no stretch of the imagination stands for the proposition that a trial court is to presume a board of education is guilty of bad faith and abuses of discretion in cases where allegations of racial discrimination are involved.

A thorough examination of the record demonstrates that the Cincinnati School Administrators over a period of many years had to make many educational decisions. Each of these decisions was made in a complex situation and involved the weighing of many conflicting factors. In each instance the public school officials were required to make the decisions on their best professional judgment to select the approach most likely to produce the highest quality

educational result. A thoroughgoing search of records as presented by the plaintiffs and the Stipulation fails to show any pattern of racial discrimination. The trial court has made an exhaustive study of the record and has weighed the evidence presented by the several witnesses. The trial court has made specific findings in particular areas of controversy and made a general finding that the plaintiffs have failed to show intentional discrimination on the part of the Cincinnati Public School System. On the basis of a careful review of the evidence it not only is impossible to say that the trial court was "clearly erroneous" in its findings but the findings of the trial court are supported by evidence contained in the record.

FILED
SEP 30 1970

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OCTOBER TERM 1969

5210

~~MISC. NO. 2172~~

TINA DEAL, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN REPLY TO SUPPLEMENTAL PETITION FOR CERTIORARI

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BRIEF IN REPLY TO SUPPLEMENTAL PETITION FOR CERTIORARI

The Petitioners rely primarily upon a decision of the United States District Court for the Middle District of Tennessee, Nashville Division, in the case of *Robert W. Kelley, et al., Plaintiffs* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., Defendants.*

At the time of *Brown* v. *Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, 38 A.L.R. 2d 1180, the Tennessee Constitution, Article II, Section 12, provided the following for the governance of Tennessee schools:

> "No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school."

Also at that time the Tennessee Code, Section 49-1005 provided:

> "The county board of education shall designate the schools which the children shall attend; provided, that

separate schools shall be established and maintained for white and for negro children."

In Ohio segregation has been unlawful since 1887. See 84 Ohio Laws 34.

The comparison of the law of Ohio with the law of Tennessee places in bold relief the distinction between the Metropolitan Board of Education of Nashville, and Davidson County, Tennessee, and Cincinnati, Ohio. Nothing in the opinion of the United States District Court for the Middle District of Tennessee in the above case has any relevance to the Cincinnati situation.

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